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Supreme Court of the United States

OCTOBER TERM, 1948

No. 764

GULF OIL CORPORATION,

Petitioner,

against

M/V "JOHN A. BROWN," ORIENTAL TRADE & TRANSPORT COMPANY, LIMITED,

Claimant-Respondent.

CONSOLIDATED CAUSE

BRIEF OF CLAIMANT-RESPONDENT, ORIENTAL TRADE & TRANSPORT COMPANY, LIMITED, IN OPPOSITION TO THE PETITION

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Bowne & Co., Inc., 163 Front Street, New York 7

INDEX

PAGE

FACTS 1

ARGUMENT 3

CONCLUSION 7

CASES CITED

Aakre, The, 122 Fed. 2nd 469 (C. C. A. 2) 4

Blue Jacket, The, 144 U. S. 371 ..... 5, 7

Bylayl, Th 49 Fed. Supp. 439 (S. D. N. Y.) affirmed 139 Fed. 2nd 348 (C. C. A. 2) 7

City of New York v. American Export Lines, 131 Fed. 2nd 902 (C. C. A. 2) 7

City of Washington, The, 92 U. S. (2 Otto) 31 4

Corozal, The, 62 Fed. Supp. 123 6

George DuMois, The, 153 Fed. 833 (C. C. A. 4) 5

Gulf Star, The, 136 Fed. 2nd 461 (C. C. A. 2) 7

Harbor Oil Transport Co. of Conn. v. The Plattsburgh Socony, 151 Fed. 2nd 708 (C. C. A. 2) 5

Lind v. United States, 156 Fed. 2nd 231 (C. C. A. 2) 5

Mamei, The, 152 Fed. 2nd 924 (C. C. A. 3) 5

Minerva, The, 58 Fed. Supp. 884, affirmed per curiam 156 Fed. 2nd 61 (C. C. A. 3) 5

Ottawa, The, 3 Wall. 268 6

Pennsylvania, The, 19 Wall. 125 4

Puratich v. United States, 126 Fed. 2nd 914 (C. C. A. 9) 5

Rice v. United States, 168 Fed. 2nd 219 (C. C. A. 2) .. 5

Virginia and Joan, The, 13 Fed. Supp. 419 (D. Mass.), affirmed 86 Fed. 2nd 259 (C. C. A. 1) 5

STATUTES

International Rules, Article 28, 33 U. S. C. Sec. 113 ... 3, 4

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The Facts.

The facts set forth in the petition, page 2, do not fully disclose the circumstances of the collision as a result of which these cases arose. They are fully stated in the findings made in the Trial Court (R. 300-309) and in the opinion of that Court (R. 284-290) which were accepted as correct by the Court of Appeals in its opinion (R. 320). We feel it necessary to restate the facts in order to supply material ones omitted in petitioner's brief.

Between 9:00 and 10:00 p. m. on the night of the collision the *Gulfcoast,* No. 72 in the convoy, failed to keep in line behind the commodore ship, No. 71, but tended to veer toward column 6 on her port hand, and got sufficiently out of line so that it became necessary for her to veer to

her own starboard so as to resume her station in column 7 which was her proper column. She reduced her speed about two knots with the result that she dropped back on the port side of the *Brown* which was approximately holding her correct position in column 7 (R. 301, 302).

At 9:00 p. m. the visibility was only about one-quarter of a mile due to a drizzling rain which had set in, and when the *Gulfcoast* got out of her proper station in the convoy the *Brown* lost sight of her. Between 9:30 and 10:00 p. m. the *Brown* observed a vessel 2 to 2½ points on her port bow, the identity of which was unknown to anyone on board the *Brown* but which later turned out to be the *Gulfcoast,* and which was falling back to a position abeam of the *Brown.* When that occurred, between 10:00 and 10:05 p. m., the *Brown* flashed, by use of an electric torch, by Morse code the inquiry "What No?", the purpose being to learn the convoy number, if any, of the vessel so observed (R. 302).

No answer was given to the inquiry but there was a flash from the *Gulfcoast* which indicated that the *Brown's* signal had been observed (R. 302).

Not knowing that the unknown vessel was the *Gulfcoast,* the *Brown* nevertheless kept her under observation and seeing that she was converging toward the *Brown's* course the *Brown* reduced her own revolutions just prior to 10:00 o'clock (R. 302).

The *Gulfcoast* continued to angle toward her own starboard and when the *Brown's* deck officer observed a considerably sharper angle he recognized there was danger of collision, turned on the *Brown's* lights, which at once showed and were observed on the *Gulfcoast* (R. 302), but it was not until the angle of the *Gulfcoast* to her own starboard materially increased that danger of collision arose (R. 106, 113). As soon as her running lights were displayed, the *Brown's* gyro pilot was put in a hand posi-

tion, her rudder placed hard right, and the master was called to the bridge and took command (R. 303).

The master ordered a one-whistle signal, which was blown and heard on the *Gulfcoast,* but the latter, notwithstanding, continued on her course, blew no whistle, showed no lights, made no effective change in her helm until too late, and struck the *Brown* (R. 303).

Argument.

The petitioner bases its petition for certiorari on three grounds. Each is insufficient and concerns solely questions of fact which have been resolved by two Courts against the petitioner.

Assuming that the *Brown's* one-whistle signal was not in strict compliance with Article 28 of the International Rules, the lapse of time between the initiation of the *Brown's* starboard turn and the blowing of the one-blast whistle signal in no way contributed to the collision. Whether it did or did not so contribute is manifestly a question of fact and the Trial Court (R. 304) and the Court of Appeals (R. 322) both agreed that it did not and could not have contributed to the collision.

Article 28 of the International Rules requires that a vessel shall indicate a direction of course to her own starboard by sounding a signal of one blast. Obviously the purpose of the Rule is to advise the other vessel in what direction the vessel which is sounding the whistle is going to go. There is nothing in the Rule to indicate that its purpose is to serve as an alarm signal or to advise the other vessel that the one blowing the whistle is there at all. As was stated by the Trial Court, the complaint of the *Brown's* navigation made by the master of the *Gulfcoast* was *not* that the collision occurred as a result of the *Brown's* turn to the right but, as he alleged, because of a later turn which was abruptly to the *Brown's* own *port*

and across the course of the *Gulfcoast* (R. 297), a turn which the evidence established and both Courts found the *Brown* never took.

The petitioner seems to argue that the rule in *The Pennsylvania,* 19 Wall. 125, 136, makes it impossible for a vessel which has committed a statutory fault ever to be relieved from liability, but that is not the effect of *The Pennsylvania* decision. As the Court of Appeals said in *The Aakre,* 122 Fed. (2d) 469 (C. C. A. 2) at p. 474:

> "Indeed, however The Pennsylvania rule was originally stated, the history of its application shows that it has done no more than shift the burden of proof with regard to causality. That was all that was necessary to the decision of The Pennsylvania case itself, to the Richelieu case, supra, and to The Martello, 153 U. S. 64, 74, 14 S. Ct. 723, 38 L. Ed. 637, and Lie v. San Francisco & P. S. S. Co., 243 U. S. 291, 298, 37 S. Ct. 270, 61 L. Ed. 726. It seems to have been disregarded altogether in White Oak Transportation Co. v. Boston, Cape Cod & New York Canal Co., 258 U. S. 341, 344, 42 S. Ct. 338, 66 L. Ed. 649, and was assumed to have done no more than shift the burden in Henry DuBois Sons Co. v A/S Ivarans Rederi, 2 Cir., 116 F. 2d 492, certiorari denied. The Ariosa v. A/S Ivarans Rederi, 61 S. Ct. 942, 85 L. Ed.—."

This Court has held that an omission to comply with the rules of navigation where it clearly appears that it had nothing to do with the disaster is not sufficient to exonerate the culpable party from any portion of the damages. *The City of Washington,* 92 U. S. (2 Otto) 31.

The decision of the Court of Appeals in this case is in no way in conflict with The Pennsylvania rule. It is merely an application of the rule and a finding of fact that the violation of Article 28 of the International Rules had no causal connection with the collision.

There is no substance to the second contention of the petitioner that the decision in this case that absence of a lookout on the *Brown's* bow was not a fault conflicts with decisions of this Court and of other Courts of Appeal.

The evidence was unanimous from the witnesses on both ships, the men who were there and knew the conditions that because of the drizzling rain and spray from the sea a lookout on the bow could not have kept an effective watch and that a better watch could have been kept from the bridge, and the Judges of two Courts have accepted this testimony from these witnesses, including the master of the *Gulfcoast* (R. 295, 324). No one except counsel for petitioner has argued that in this case it was a fault not to have a lookout on the bow.

But even if it were a fault, such fault had nothing to do with the collision because each vessel was aware of the presence and apparent heading of the other for a full fifteen minutes before the collision (R. 294). There are many decisions both in this Court and in the lower Courts which have exonerated vessels though they had no lookout at all. This Court said in *The Blue Jacket,* 144 U. S. 371:

> "It is well settled that the absence of a lookout is not material where the presence of one would not have availed to prevent a collision."

Lind v. *United States,* 156 Fed. (2d) 231 (C. C. A. 2); *The Mamei,* 152 Fed. (2d) 924, 929 (C. C. A. 3); *The Minerva,* 58 Fed. Supp. 884, 890, affirmed per curiam 156 Fed. (2d) 61 (C. C. A. 3); *Harbor Oil Transport Co. of Conn.* v. *The Plattsburgh Socony,* 151 Fed. (2d) 708, 709 (C. C. A. 2); *Rice* v. *United States,* 168 Fed. (2d) 219, 220 (C. C. A. 2); *Puratich* v. *United States,* 126 Fed. (2d) 914 (C. C. A. 9); *The George Dumois,* 153 Fed. 833 (C. C. A. 4); *The Virginia and Joan,* 13 Fed. Supp. 419, affirmed 86 Fed. (2d) 259 (C. C. A. 1).

The decision of this Court in *The Ottawa* (3 Wall. 268) is not analogous for there the steamship had no lookout at all except the master and there was some doubt that even he was on deck. The schooner with which the steamer collided was not seen in time. In *The Corozal*, 62 Fed. Supp. 123, there was no lookout at all when the other ship was first sighted. If she had been sighted sooner the collision might have been avoided.

In the case at bar the *Brown* not only had three men on lookout besides the Third Mate on watch (R. 301), but the Third Mate had seen the *Gulfcoast* himself a good one-half hour before the collision and had signaled to her then (R. 302, 112).

As to petitioner's third contention, it is in error in asserting that the Court of Appeals held that the *Brown* should have turned her lights on earlier. The Court of Appeals said that it is a fault not to turn on the lights of a ship in convoy when the time to take action has come but it did not hold that such time had come in this case before the lights actually were turned on. What that Court said was:

> "It is very doubtful whether the time for action had arrived before the lights were in fact turned on. The ships had already been in communication, and the *Brown* was justified in supposing that the *Gulfcoast* had made her out and would keep out of her way; for the *Brown* was in her column and the *Gulfcoast* was not. Besides, it must be remembered that to light up even a single ship may expose a whole convoy to attack, for lights can be seen afar off; and a master's decision must always be the choice between that danger and the danger of any further delay in disclosing the position of a ship" (R. 323).

Both Courts below held that the lights were turned on sufficiently soon amply to advise the *Gulfcoast* of the

Brown's position and movements so far as lights would do so and gave her every chance to act (R. 304, 323). As the Court of Appeals said (R. 323), the *Gulfcoast* did nothing because she thought that nothing was enough.

As far as the fact that the *Brown* turned to her right to avoid collision instead of stopping and reversing is concerned, the situation when this action was taken was an emergency, and the cases are legion where failure to reverse has been excused in such an emergency. *The Blue Jacket*, 144 U. S. 371; *The Bylayl*, 49 Fed. Supp. 439, affirmed 139 Fed. (2d) 348 (C. C. A. 1); *The Gulf Star*, 136 Fed. (2d) 461, 465 (C. C. A. 2); *City of New York* v. *American Export Lines*, 131 Fed. (2d) 902, 905 (C. C. A. 2).

The questions raised by the petitioner are disputed questions of fact decided against the petitioner and are not properly a subject for review by this Court.

CONCLUSION.

The petition for certiorari should be denied.

Respectfully submitted,

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Counsel for Claimant-Respondent.